

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARK DANIEL SCHALLIOL,  
Plaintiff,  
v.  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,  
Defendant.

No. SACV 17-1219 AGR

## MEMORANDUM OPINION AND ORDER

Plaintiff filed this action on July 17, 2017. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 11, 12.) On March 6, 2018, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court affirms the decision of the Commissioner.

1

## PROCEDURAL BACKGROUND

3 Plaintiff filed application for disability insurance benefits and supplemental  
4 security income benefits. In both applications, Plaintiff alleged an onset date of May 1,  
5 2011. Administrative Record (“AR”) 13. The applications were denied. AR 13, 92-93.  
6 Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). On February  
7 2, 2016, the ALJ conducted a hearing at which Plaintiff and a vocational expert (“VE”)  
8 testified. AR 37-67. On March 1, 2016, the ALJ issued a decision denying benefits.  
9 AR 10-25. On May 15, 2017, the Appeals Council denied review. AR 1-5. This action  
10 followed.

11

## **STANDARD OF REVIEW**

13 Pursuant to 42 U.S.C. § 405(g), this court has authority to review the  
14 Commissioner's decision to deny benefits. The decision will be disturbed only if it is not  
15 supported by substantial evidence, or if it is based upon the application of improper  
16 legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam);  
17 *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

18        “Substantial evidence” means “more than a mere scintilla but less than a  
19 preponderance – it is such relevant evidence that a reasonable mind might accept as  
20 adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether  
21 substantial evidence exists to support the Commissioner’s decision, the court examines  
22 the administrative record as a whole, considering adverse as well as supporting  
23 evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than  
24 one rational interpretation, the court must defer to the Commissioner’s decision.  
25 *Moncada*, 60 F.3d at 523.

25 || *Moncada*, 60 F.3d at 523.

111.

## DISCUSSION

## A. Disability

A person qualifies as disabled, and thereby eligible for such benefits, "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." *Barnhart v. Thomas*, 540 U.S. 20, 21-22 (2003) (citation and quotation marks omitted).

## **B. The ALJ's Findings**

The ALJ found that Plaintiff met the insured status requirements through December 31, 2016. AR 15. Following the five-step sequential analysis applicable to disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),<sup>1</sup> the ALJ found that Plaintiff had the severe impairments of degenerative disc disease of both the lumbar with disc protrusion and the cervical spine. AR 15.

The ALJ found that Plaintiff had the residual functional capacity (“RFC”) to perform a range of medium work. He could lift/carry up to 50 pounds occasionally and up to 25 pounds frequently; sit, stand or walk for six hours in an eight-hour workday; occasionally climb ramps, stairs, ladders, ropes and scaffolds; and occasionally balance, stoop, kneel, crouch and crawl. AR 18-19. Plaintiff could not perform any past relevant work but there were jobs that existed in significant numbers in the national economy that he could perform such as hand packager, machine feeder and industrial cleaner. AR 23-24.

<sup>1</sup> The five-step sequential analysis examines whether the claimant engaged in substantial gainful activity, whether the claimant's impairment is severe, whether the impairment meets or equals a listed impairment, whether the claimant is able to do his or her past relevant work, and whether the claimant is able to do any other work. *Lounsbury*, 468 F.3d at 1114.

1           **C. Medical Source Opinions**

2           Plaintiff argues that the ALJ failed to consider properly the opinions of Dr. Niska,  
3 an examining physician, and Dr. Khan, a treating physician.

4           An opinion of a treating physician is given more weight than the opinion of  
5 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an  
6 uncontradicted opinion of a medically acceptable treating source, an ALJ must state  
7 clear and convincing reasons that are supported by substantial evidence. *Bayliss v.*  
8 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When a treating physician's opinion is  
9 contradicted by another doctor, "the ALJ may not reject this opinion without providing  
10 specific and legitimate reasons supported by substantial evidence in the record. This  
11 can be done by setting out a detailed and thorough summary of the facts and conflicting  
12 clinical evidence, stating his interpretation thereof, and making findings." *Orn*, 495 F.3d  
13 at 632 (citations and quotation marks omitted).

14           An examining physician's opinion constitutes substantial evidence when, as here,  
15 it is based on independent clinical findings. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir.  
16 2007). When an examining physician's opinion is contradicted, "it may be rejected for  
17 'specific and legitimate reasons that are supported by substantial evidence in the  
18 record.'" *Carmickle v. Comm'r*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citation omitted).

19           "When there is conflicting medical evidence, the Secretary must determine  
20 credibility and resolve the conflict." *Thomas v. Barnhart*, 278 F.3d 947, 956-57 (9th Cir.  
21 2002) (citation and quotation marks omitted).

22           The ALJ gave some weight to the opinion of Dr. Niska except that the ALJ  
23 "further limited the claimant's capacity for postural activities to an occasional basis to  
24 accommodate his subjective complaints." AR 22. Plaintiff reported to Dr. Niska on  
25 August 7, 2014 that he was not taking any medications. AR 21, 365. Dr. Niska noted  
26 that Plaintiff had a normal gait with no signs of limp or antalgia. He was able to squat,  
27 sit in a chair comfortably and rise from a sitting position with mild difficulty. Plaintiff had  
28 decreased range of motion in the neck and cervical spine with rotation limited to 50

1 degrees bilaterally. There was moderate tightness in the trapezius muscles bilaterally  
2 and fairly mild tenderness to palpation. There was decreased range of motion with pain  
3 on forward bending. Straight leg raise was negative. AR 366. The upper and lower  
4 extremities were within normal limits with 5/5 motor strength. AR 366-68. Dr. Niska  
5 diagnosed degenerative disc disease both of the lumbar spine with disc protrusion and  
6 of the cervical spine based on the MRI reports, subjective findings of lower back and  
7 neck pain, and decreased range of motion. Dr. Niska concluded that Plaintiff could  
8 lift/carry up to 50 pounds occasionally and 25 pounds frequently. He could sit for eight  
9 hours and stand or walk six hours out of an eight-hour workday. He could frequently  
10 bend or crouch and had no overhead restrictions. AR 369.

11 Plaintiff argues that the ALJ should have addressed how far Plaintiff could bend  
12 or stoop. Dr. Niska did not include limitations on the extent of Plaintiff's bending or  
13 stooping in his functional limitations and, therefore, Plaintiff is not complaining of an  
14 error in considering Dr. Niska's opinion. Dr. Niska noted decreased range of motion to  
15 middle of the tibia with forward bending. AR 366. However, there is no indication in Dr.  
16 Niska's opinion that this observation would have any effect on Plaintiff's ability to work.

17 Plaintiff further argues that the ALJ improperly rejected Dr. Khan's findings of  
18 reduced range of motion in the neck, low back and hip in 2011. AR 297-98; *see also*  
19 AR 327-29 (chiropractor). Like Dr. Niska, however, Dr. Khan also did not include  
20 restrictions on how far Plaintiff could bend or stoop.

21 On April 17, 2011, Plaintiff was pulling a pallet with a coworker when he slipped  
22 on a wet floor and fell on his left hip with his right foot underneath the pallet jack. He  
23 yelled to his coworker, who did not understand and pushed the pallet jack over  
24 Plaintiff's right foot, injuring his toe. Plaintiff was referred for treatment at Kaiser  
25 Permanente and underwent physical and chiropractic therapy. Plaintiff's employer did  
26 not honor his modified work duties, so Plaintiff continued doing his regular work duties  
27 through July 4, 2011, when he was terminated. AR 292-93.

28

1 On September 1, 2011, Dr. Khan noted moderate paraspinal tenderness, muscle  
2 guarding and spasms from C1 through T1. Shoulder compression test was positive.  
3 Motor strength was 5/5 in the upper extremities. AR 297. Dr. Khan found reduced  
4 range of motion in the cervical spine of 30/50 flexion, 40/60 extension and 20/80  
5 rotation. Cervical spine lateral tilt and flexion was normal. With respect to the lumbar  
6 spine, Dr. Khan found moderate paraspinal tenderness, muscle guarding and spasms  
7 at all levels through L5/S1. Plaintiff had reduced range of motion of 25/60 flexion, 15/20  
8 extension and 20/30 lateral bending. Lumbar spine rotation was normal. AR 298.  
9 Plaintiff's left hip was tender with normal range of motion except for 10/30 thigh and hip  
10 extension. AR 299. Dr. Khan prescribed pain medication and physiotherapy, and  
11 recommended MRIs of the cervical spine, lumbar spine and hip. AR 300.

12 In Dr. Khan's report dated April 8, 2013, Dr. Khan stated that, through November  
13 28, 2012, Plaintiff "was provided conservative treatment appropriate for his condition."  
14 AR 257. Plaintiff complained of occasional pain of 5/10 in the neck with radiation to the  
15 bilateral shoulders. The pain was made worse by bending and twisting the neck, and  
16 relieved by injections. AR 259. Plaintiff complained of constant low back pain at 7/10  
17 with radiation to the left hip. The pain was made worse by bending and twisting at the  
18 waist. Plaintiff also complained of pain in the left hip at 7/10, made worse by twisting  
19 the leg. AR 260.

20 Dr. Khan reviewed the MRIs in 2011 and 2012. AR 258-59. On examination of  
21 the cervical spine, Dr. Khan noted tenderness on palpation and palpable myospasm of  
22 the paraspinal muscles, upper trapezius muscles and spinous processes at C2-C6  
23 bilaterally. Range of motion was 35/50 flexion and extension, 30/45 lateral bending,  
24 and 55/80 rotation. Foraminal compression and shoulder compression were positive.  
25 AR 261, 264. With respect to the lumbar spine, Dr. Khan noted tenderness to palpation  
26 and palpable myospasm of the paraspinal muscles and spinous processes at L1-L5  
27 bilaterally. Range of motion was 30/50 flexion, 5/20 extension and 20/30 in lateral  
28 bending and rotation. There was tenderness to palpation at the sacroiliac joints

1 bilaterally. Straight leg raising was positive bilaterally. AR 261-62, 264-65. Dr. Khan  
2 found no tenderness, motor weakness or muscle wasting at the left hip, although there  
3 was reduced range of motion of 80/100 flexion, 30/40 internal rotation, 40/50 external  
4 rotation and 30/40 abduction. AR 262-63, 265. Motor strength was 5/5 in the upper  
5 extremities and 4+/5 in the lower extremities. AR 263.

6 Dr. Khan recommended work restrictions “solely to prevent unnecessary  
7 exacerbation of pain and re-aggravation which may lead to repeated periods of  
8 temporary disability, and/or result in increased permanent disability. . . . These are  
9 recommended on a prophylactic basis.” AR 265. Dr. Khan recommended that Plaintiff  
10 be allowed to stretch as needed and be precluded from lifting greater than 10 pounds,  
11 repetitive bending, stooping or squatting activities; kneeling activities and sitting,  
12 standing and walking greater than one hour per day. *Id.* Dr. Khan recommended an  
13 active exercise program to maintain and/or increase range of motion, increase muscle  
14 strength, improve his level of occupational and social functioning and help integration  
15 into a productive workforce. AR 268.

16 Dr. Khan did not include restrictions as to how far Plaintiff could bend or stoop,  
17 and did not express an opinion that the reduced range of motion would affect Plaintiff's  
18 ability to work. Therefore, the ALJ did not err.<sup>2</sup>

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20 \_\_\_\_\_  
21 <sup>2</sup> The ALJ gave little weight to the opinion of Dr. Khan. There was no diagnostic  
22 evidence corroborating Plaintiff's subjective complaints of radiculopathy or other  
23 neurological deficits. AR 21. An electrodiagnostic study in September 2011 found no  
24 evidence of entrapment neuropathy or active cervical radiculopathy in the upper or  
25 lower extremities. AR 248-53. The ALJ found that Dr. Khan's recommended limitations  
26 were excessive in light of Plaintiff's course of treatment at the time and were expressly  
27 made as a prophylactic measure. The ALJ found that Dr. Khan's recommended  
28 limitations did not reflect Plaintiff's residual functional capacity on a longitudinal basis  
and were inconsistent with his minimal whole body impairment rating and other medical  
source evidence. Subsequent records showed no diagnostic workups or treatment for  
the alleged conditions until Dr. Niska's evaluation on August 7, 2014. AR 21. The  
medical records in 2015 indicate normal neck and musculoskeletal examination. AR  
383, 386-87. The ALJ did not err in discounting this portion of Dr. Khan's opinion.

1           D. **Credibility**

2           “To determine whether a claimant’s testimony regarding subjective pain or  
3 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter v.*  
4 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, “the ALJ must determine  
5 whether the claimant has presented objective medical evidence of an underlying  
6 impairment ‘which could reasonably be expected to produce the pain or other  
7 symptoms alleged.’” *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)  
8 (en banc)). The ALJ found that Plaintiff’s medically determinable impairments could  
9 reasonably be expected to cause some of the alleged symptoms. AR 19.

10           Second, when an ALJ concludes that a claimant is not malingering and has  
11 satisfied the first step, “the ALJ may ‘reject the claimant’s testimony about the severity  
12 of her symptoms only by offering specific, clear and convincing reasons for doing so.’”  
13 *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (citation omitted); *Burrell v.*  
14 *Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014). “A finding that a claimant’s testimony is  
15 not credible ‘must be sufficiently specific to allow a reviewing court to conclude the  
16 adjudicator rejected the claimant’s testimony on permissible grounds and did not  
17 arbitrarily discredit a claimant’s testimony regarding pain.’” *Brown-Hunter*, 806 F.3d at  
18 493 (citation omitted). “General findings are insufficient; rather, the ALJ must identify  
19 what testimony is not credible and what evidence undermines the claimant’s  
20 complaints.” *Id.* (citation omitted).

21           The ALJ determined that Plaintiff’s “statements concerning the intensity,  
22 persistence and limiting effects of these symptoms are not entirely credible because  
23 those allegations are greater than expected in light of the objective evidence at the  
24 hearing level.” AR 19. In addition, “the claimant’s rather limited and conservative  
25 course of treatment to date is inconsistent with the alleged severity of his pain  
26 symptoms and related functional limitations; it diminishes the credibility of those  
27 allegations as a whole.” AR 22. Plaintiff testified that he cannot work because the pain  
28 is “insane” and he has emotional issues. AR 46. Plaintiff testified that he used only

1 heat, ice packs and a muscle relaxer at night, three to four times per week, but that did  
2 not "completely remove the pain." AR 19, 47-48. As the ALJ noted and as discussed  
3 above, Dr. Khan provided what he characterized as conservative treatment for Plaintiff's  
4 pain through April 2013. AR 21. The ALJ further noted that medical records in 2014  
5 and 2015 do not indicate treatment for neck, back or hip issues other than the muscle  
6 relaxer. AR 21-22. Plaintiff has not shown error.

7 IV.

8 ORDER

9 IT IS HEREBY ORDERED that the decision of the Commissioner is affirmed.

10  
11 DATED: May 4, 2018

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13 ALICIA G. ROSENBERG  
14 United States Magistrate Judge